SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 32

JAMES R. HOFFA, *Petitioner*

v.

UNITED STATES

No. 33

THOMAS EWING PARKS, *Petitioner*

v.

UNITED STATES

No. 34

LARRY CAMPBELL, *Petitioner*

v.

UNITED STATES

No. 35

EWING KING, *Petitioner*

v.

UNITED STATES

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government's brief is devoted largely to immaterial or irrelevant issues. In this reply, we refocus the issues and facts in terms of what they relevantly are.

(1) As to the Fourth and Sixth Amendments

Innocence or guilt is not in issue before this Court. But the Government's first argument is an attempt to show Petitioners' guilt of jury tampering—albeit under the transparent pretext of giving "context and background" (Gov. Br. 4-11, 60-61). Even more irrelevantly the Government argues Petitioner Hoffa's guilt of the plot to assassinate Robert Kennedy, as asserted by Partin (Gov. Br. 14-16, 19, 78, 81).

The relevant and indisputable facts are these: Partin was a secret Government agent who, in the guise of union colleague and defense helper, made repeated entries into Petitioner Hoffa's residence and Test Fleet defense headquarters. Those simple and indisputable facts, which stand in the Government's way, should not be permitted to be outflanked by the many and immaterial diversions of the Government's brief. Because of those simple and indisputable facts, all of the following Government contentions are immaterial to the issues before the Court:

(a) That Partin arranged to see Petitioner Hoffa in Nashville before he became the Government's secret agent (Gov. Br. 73-77, 79-80).

(b) That the Government did not pay Partin for his services as its secret agent (Gov. Br. 81-83).

(c) That Grimsley and Sheridan in behalf of the Government only "requested" and did not "instruct" Partin "to keep his eyes and ears open when he was in Nashville" and to report "any attempts at witness intimidation or tampering with the jury" and "if he heard anything of interest" (Gov. Br. 76-77, 83-84; see our Brief at 8-9).

From the foregoing assertions, the Government makes a semantic argument that Partin was not "deceptively placed" as a secret informer in Petitioner Hoffa's quarters and councils during a criminal trial (Gov. Br. 73-84, 133-144); and the Government proceeds from there to several irrelevancies—such as a citizen's duty to report crimes to the Government (Gov. Br. 80-81, 101, 134), and the risk that a visitor in a home will report conversations in the home to the police (Gov. Br. 124-133). The end achievement of this process of argument by assertions of immaterial fact and irrelevant legal argument is the presentation of a non-existent case. In that non-existent case, Partin gets his claimed evidence of jury tampering from Petitioners Hoffa and King before, and not after, he becomes the Government's secret agent, and as a good citizen merely reports all he has heard and overheard to the Government. That is the case the Government argues. But that is not this case.

In our view, the Government is factually wrong on its immaterial assertions of fact which we have itemized above. But on any view of the record, and without question, the following facts remain true and unaffected. Upon the initiative of Grimsley (Sheridan's subordinate), Partin went to Atlanta and conferred with him on October 20, 1962. At the conference, Grimsley asked Partin and Partin agreed "to keep his eyes and ears open when he was in Nashville" and to report to Sheridan "any attempt at witness intimidation or tampering with the jury" and "if he heard anything of interest." When Partin was ready to go to Nashville, he telephoned Grimsley; and at Atlanta when changing planes for Nashville, Partin again called Grimsley to tell him that he was on his way.

Partin "knew what he was looking for" in Nashville. On his arrival there on October 22, he immediately began "to discover or to turn in . . . evidence that would substantiate . . . a violation of the law or jury tampering" or "something like that" as "he had already been instructed" by the Government. He continued that work throughout most of the Test Fleet trial with daily reports to Sheridan and frequent ones to Grimsley. (See our Brief at 8-9, 12-13; Gov. Br. 77). Those bare details alone (there are many more, see our Brief at 5 ff.) suffice to show the one simple, indisputable fact that all of Partin's entries into Petitioner Hoffa's residence and Test Fleet defense headquarters were as an undisclosed Government agent hiding under the guise of union colleague and Test Fleet defense helper.

(2) As to the Fourth Amendment

Ignoring the above facts, the Government irrelevantly argues (Gov. Br. 126-127) there is no Fourth Amendment protection "when one makes indiscreet revelations, intended to be confidential, which the auditor thereafter reveals to the Government" because "the damage suffered as a result of the misplacement of trust bears no relationship, legal or logical, to the place where the statements are made." But the Fourth Amendment most surely protects a citizen against Government intrusions into his home without valid warrants. Every entry by Partin into Petitioner Hoffa's hotel suite was such a Government intrusion into his home for the very purpose of obtaining the admissions which Partin claims he got. Partin had no warrants, valid or otherwise. True, his entries were by deception and not force, and he got verbal statements and not documents. But the Government con-

cedes, as it rather clearly must, that the Fourth Amendment protects against deceptive entries and against the obtaining of verbal statements (Gov. Br. 125). Having made those concessions, the Government should appropriately confess error at this point.

Instead of confessing error, the Government proposes a novel, unsupported, and in our view, shameful limitation on Fourth Amendment protection—that so far as verbal statements in a home are concerned, Fourth Amendment protection is limited solely to what is heard by Government "eavesdropping." Even if there were such a limitation, it would not help the Government in this case. According to Government agent Partin himself, some of the critical admissions which convicted Petitioners were obtained by his eavesdropping in Petitioner Hoffa's home. (See our Brief at 16, 17 and 18.)

Nevertheless, we comment on the Government's eavesdropping limitation. In the histo[illegible] of the Fourth Amendment and its many and varied judicial applicaitons, there is nothing to justify a rational distinction between the policeman who without a valid warrant enters a home and hides in a closet, and a policeman who without valid warrant enters a home by hiding his true identity and purpose and engages the householder in conversations. In both cases, the Government has violated the Fourth Amendment by its entry, and in both cases the Government unbeknownst to the householder is listening in, i.e., eavesdropping, on the conversation. In neither case does it make any sense to talk (Gov. Br. 126-127) of statements voluntarily made through misplaced trust in a visitor to the home. (See our Brief at 35-38.) There would be little left of the very core of Fourth Amendment protection if

a citizen could not safely assume that there is no policeman looking for evidence in his home unless the officer has appeared at the door with a warrant and announced his purpose.

There is no basis for the Government's unique theory that a listener is conducting a search and effecting a seizure only if he is an eavesdropper. Listening for the purpose of discovering evidence of criminal activity is a search, and the words heard are seized, whether the listener is hidden or in full view. Cf. *Wong Sun* v. *United States,* 371 U.S. 471, 485; *Fraternal Order of Eagles* v. *United States,* 57 F. 2d 93 (C.A. 3).[1]

Nor was Partin merely a passive auditor (R. 409) into whose unwilling or indifferent ears the incriminating statements fell. He was present in the protected area for the precise purpose and under the specific instructions to obtain evidence, in pursuance of which instructions he, Partin, initiated conversations or inquiries which led to incriminating admissions (R. 440-443, 466).

Thus, at least as to some of the vital statements concerned, Partin was an eavesdropper, who obtained

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[1] The fact that Government informers are conducting searches when they converse with suspects does not mean, as the Government fears (Gov. Br. 135), that "every use of an informant would amount to an unconstitutional breach of privacy." An auditory search is no more unconstitutional *per se* than any other search. The question always is whether the search is "reasonable" and involves protected premises. An auditory search could be unexceptionable, for example, if conducted in a public place (such as the laundry in *On Lee* v. *United States,* 343 U.S. 747) or on private premises to which access was obtained by invitation and without concealment of official status (as in *Lopez* v. *United States,* 373 U.S. 427), or if "reasonable" within the meaning of the Fourth Amendment, or if authorized by a valid warrant.

entry into the protected area by fraud and deception; and, as to other statements, he actively conducted a search and elicited the sought-for reply.

The Government argues that a face-to-face conversation by its nature can never offend the Fourth Amendment because such conversations involve only a breach of confidence and not of the privacy of the home. The Government asserts that the "harm sustained is precisely the same whether the incriminating remarks are made on the street, in one's office, or in the privacy of one's home" (Govt. Br. 126).

Privacy, however, is an interest of people, not of rooms or buildings. The significance of the home is that the Fourth Amendment affords a greater protection to the individual's privacy in the home than to his privacy on the street. So, although the "harm sustained" by an individual is "precisely the same" whether contraband is seized in his home or from his automobile or his person while in a public place, in the first situation the seizure is unlawful without a warrant, and in the others the seizure is lawful without a warrant if probable cause exists. See cases reviewed in *Ford* v. *United States,* 352 F. 2d 927 (D.C. Cir.).

The interest of privacy while at home warrants as much protection from Government spies who obtain entry by deception and who are planted without probable cause as from eavesdroppers. In fact, it can reasonably be urged that the intrusion of the former is more pernicious than that of the latter.

Finally, as to the Fourth Amendment, the Government continues in its effort to treat the facts in this case as if they were the same as those in *Lopez* v. *United States,* 373 U.S. 427 (see Govt. Br. 126-128). But *Lopez* dealt with a *known* Government agent.

In *Lopez* the agent did not enter the premises unlawfully. In this case, Partin's entry was offensive to the Fourth Amendment not only because it was effected by deception; but also because it occurred at a time and place when privacy was peculiarly important—when Hoffa was on trial in a criminal case and where his defense councils were being held (see our Brief 43).

(3) As to the Sixth Amendment With Respect to Intrusion on the Test Fleet Defense

The Government argues as if a Sixth Amendment violation by its intrusion on the Test Fleet defense depends upon the passing of defense information to the Government (Gov. Br. 91-101). The Government seeks to buttress its argument, made on that assumption, by the assertion of a conflict between the evidence of Partin and the evidence of the Test Fleet defense lawyers (Gov. Br. 91-93). There is no such conflict in the evidence. As a reading of Partin's testimony shows, and as the Government brief itself indicates (Gov. Br. 94-96), Partin does not deny the testimony of the Test Fleet defense lawyers as to his intrusions on the Test Fleet defense (see our Brief 10-13).[2]

Being somewhat constrained by the record, the Government (even after its long effort at minimization

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[2] Partin was in Nashville on 33 different days during the trial (Gov. Br. 37). He admittedly reported to the Government once a day or oftener. His testimony was of things he heard and saw on only eight different days in Nashville. His reports of his observations on the other 25 days must therefore have concerned more than that to which he testified—i.e., matters other than evidence of jury tampering. Further, from the length of the conversations between Sheridan and Partin (sometimes longer than an hour) (R. 910), it must be assumed that the conversations were not one-sided, that Sheridan participated therein and was giving day to day instructions to Partin, and that the conversations were not confined to the short statements to which Partin testified.

(Gov. Br. 91-95)), admits that Partin did pass some Test Fleet defense information to the Government (Gov. Br. 95-101).

But more relevantly, the Sixth Amendment is violated by the Government's very presence in the protected consultations of the defense, whether or not any defense information was passed to the Government. The Government explicitly admits this at one point in its brief (Gov. Br. 71, 109) and in any event it is well settled by *Glasser* v. *United States,* 315 U.S. 60, 76; *Caldwell* v. *United States,* 205 F. 2d 879 (C.A. D.C.) and *Coplon* v. *United States,* 191 F. 2d 749 (C.A. D.C.). The Government (Gov. Br. 71) concedes that *Caldwell* and *Coplon* were correctly decided.

The Government further concedes that Partin's testimony was inadmissible if it was tainted as the "fruit" of the Government's violation of the Sixth Amendment by its intrusion on the Test Fleet defense (Gov. Br. 108, 110). Cf. the argument made in our brief at pp. 49-52. Yet to speak, as the Government does, of "taint" and "fruit" in relation to the record in this case is misleading. Those terms are appropriate for discussion of a case in which the nexus between the Government's violation of the Sixth Amendment and Government evidence is not immediate, direct, and apparent. Here, as we have shown (our Br. 47-48), the admissions claimed by Partin were the objective and direct product of his intrusion on the Test Fleet defense. In fine, on the facts here, we have "the poisonous tree" itself rather than any question of "taint" from its "fruits."

The Government admits for the first time in this litigation that Sheridan knowingly and purposefully risked intrusion on the Test Fleet defense (Gov. Br.

90-91). The Government seeks to justify the intrusion by arguing the reasonableness of Sheridan's action in terms of protection of jury integrity in Test Fleet (Gov. Br. 86). But jury integrity can be protected without Sixth Amendment violations. More importantly, the views of Sheridan and the Department of Justice on the reasonableness of the Sheridan-Partin actions are irrelevant. There are few cases in which those concerned with law enforcement do not believe their unconstitutional activities are reasonable in relation to one or more of their duties; but the relevant question is whether the Government has violated the prohibition of the Constitution. It is respectfully submitted that it has. Accordingly, its motive is immaterial, the evidence so obtained must be suppressed, and reversal is required.

(4) As to the Sixth and Fifth Amendments With Respect to This Proceeding

In answer to our contention that the incriminating statements allegedly obtained by Partin in the latter part of his interrogations were inadmissible because the Government had sufficient ground for arrest and charge by October 25, the Government argues that "[n]either *Massiah* v. *United States,* 377 U.S. 201, nor *Escobedo* v. *Illinois,* 378 U.S. 478, even remotely implied" such a rule (Gov. Br. 141). We disagree.[3] But in any event *Miranda* v. *Arizona,* 384 U.S. 436, 486-490, cites the British Judges Rules as significantly requiring "a cautionary warning be given an accused by [a]

[3] ". . . If such a rule is to have any efficacy, it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse . . ." *Massiah,* 377 U.S. at 206. While *Miranda* was scrupulously limited to custodial interrogation, it does not imply that the rule there announced is limited to custodial interrogation.

police officer as soon as he has evidence that affords reasonable grounds for suspicion . . ." at 487. The rule we urge here would hardly go this far. And the Chief Justice said (*Miranda,* at 489): [I]t is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdiction described".[4] The FBI practice spelled out in *Miranda* (at 485)[5] likewise would require a warning preceding an "interview with the person for a confession or admission of his own guilt."

The Government next contends that "one is not entitled to counsel while committing his crime" (Gov. Br. 142). Whatever be the merit of that contention, it does not meet the argument made by petitioners King and Hoffa that they were entitled to be free of Government interrogation after October 25 concerning alleged offenses already known to the Government, unless advised of their rights to silence and counsel.

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[4] The rules of other jurisdictions cited in *Miranda* (in addition to the British rule explicated above) indeed go substantially further.

[5] This data is contained in a letter (quoted by the Chief Justice in the majority opinion) furnished by the Solicitor General in answer to a question put by Mr. Justice Fortas at the oral argument.

(5) CONCLUSION

In short, we submit that as to all of the issues presented, there is no merit to the Government's contentions.

Respectfully submitted,

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